

**Federal Judicial Center Exploratory Study of the Appellate  
Cost Bond Provisions of  
Rule 7 of the Federal Rules of Appellate Procedure**

*Results of a Three District Exploratory Study and Proposal for Further Study  
Presented to the  
The Advisory Committee on Appellate Rules  
of the Judicial Conference of the United States*

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This report was undertaken at the request of the Judicial Conference's Advisory Committee on Appellate Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

## Contents

I. Introduction	1
II. Limitations of Exploratory Study and Possible Questions for Further Research	1
III. The Exploratory Study: The Research Data Collection Protocol	3
IV. Exploratory Study: Summary of Findings	5
A. FRAP 7 Motions Brought and Granted	7
B. Types of Cases with FRAP 7 Activity	7
C. Parties Moving for FRAP 7 Bond (Identity of Appellee)	8
D. Parties Subject to FRAP 7 Motion (Identify of Appellant)	10
E. Amounts Requested in Motions for FRAP 7 Bond	11
F. Components of Bond in FRAP 7 Motion	12
G. Amount of FRAP 7 Bonds Granted	13
H. Components of Granted FRAP 7 Bond Amounts	14
I. Appeal of the Bond Order	16
J. Posting of FRAP 7 Bond	16
K. Final Outcome of Appeal	17
V. Conclusions and Possible Options for Committee Action	19
<b>Appendix I:</b> Exploratory Study Methods	21
<b>Appendix II:</b> Draft Protocol for Further FJC Study of FRAP 7 Appellate Cost Bonds [on file with the author]	

## I. Introduction

At its Fall 2007 meeting, the Appellate Rules Advisory Committee [the Committee] discussed the current circuit split over whether Federal Rule of Appellate Procedure 7 [FRAP 7] authorizes the inclusion of attorney fees in a bond for costs on appeal. This item has been brought back before the Committee as it determines whether, in light of recent case law developments, to proceed with a proposed amendment approved by the Committee in 2003 which made clear that FRAP 7 bond “costs” do not include attorney fees.

Before proceeding, the Committee requested that the Federal Judicial Center [FJC] consider the possibility of empirical research on FRAP 7 bond activity in the federal courts. This report<sup>1</sup> describes an exploratory study undertaken by the FJC of FRAP 7 bond activity in three federal district courts: the Southern District of New York [NYS], the Central District of California [CAC], and the Eastern District of Michigan [MIE]. These districts are in circuits that permit attorney fees to be included in FRAP 7 cost bonds.

Although data from only three districts were examined, we learned that data pertaining to the bond amount, the components comprising the bond amount including attorney fees, and the authority for their inclusion cannot be retrieved from docket reports alone. Thus, one of the first lessons of the exploratory study is that the best approach to conducting empirical research on this issue is to sample cases with FRAP 7 bonds in a sample of the districts selected based on FRAP 7 circuit law. Focusing on a limited number of districts will facilitate obtaining motions papers and orders from the courts, without which many of the questions raised by the Committee cannot be answered.

## II. Limitations of Exploratory Study and Possible Questions for Further Research

In order to decide whether or not to adopt the Center’s recommendation for further research, the Committee must first decide which type of empirical data on FRAP 7 cost bonds will be most useful to it as it moves forward in its deliberations on this issue.

The first step in the exploratory study was to identify cases with at least one motion or sua sponte order to impose a FRAP 7 bond for anticipated costs on appeal. An electronic search of the CM/ECF replication databases<sup>2</sup> for NYS, CAC and MIE for fiscal years 1996 through 2006 produced relatively low numbers of cases in each district: 20 cases in NYS, 9 in CAC, and 13 in MIE. In terms of overall appellate activity in these districts, these figures represent much less than one percent of all appeals in the study period. The search also identified a few cases in each district that were possible FRAP 7

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<sup>1</sup> Other members of the Research Division of the Federal Judicial Center who have contributed to this report include Emery G. Lee III, George Cort, and Thomas E. Willging.

<sup>2</sup> The search terms used were “FRAP 7” OR “F.R.A.P. 7” OR “Rule 7” OR “F.R.App. P. 7” OR “Fed. R. App. P. 7” OR (“Bond” AND “Cost”) OR (“Bond” AND “Appeal”) OR (“Bond” AND “Appell”) OR “Federal Rule of Appellate Procedure 7” (with a “hit” for any docket entry including any of the terms or pairs of terms). For a detailed description of the process used to identify the sample of cases in the exploratory study, see Appendix I Methods.

cases, but these cases could not be positively identified as including FRAP 7 motions without access to case documents.

Automated docket-level data was then collected for this small sample of cases, employing the protocol described in this report. However, much of the information needed to answer the Committee's questions with respect to FRAP 7 bonds was not available from the brief docket entries. For example, questions with respect to the reasons for the bond offered in FRAP 7 motions and the authority judges relied upon to include components such as attorney fees in the FRAP 7 bond amount can only be answered if the specifics of the motions and rulings are available. In most cases, the motions papers and orders were not available in CM/ECF.

Assuming that it is this more substantive data on FRAP 7 motions and bonds that the Committee is ultimately interested in, the FJC would recommend limiting the number of districts studied to a manageable sample of districts purposefully chosen on the bases of FRAP 7 bond-specific considerations. The selection of the study would begin by including districts in circuits permitting attorney fees to be included in a FRAP 7 bond amount<sup>3</sup>, districts in circuits that do not permit attorney fees to be included in a FRAP 7 bond<sup>4</sup>, and districts in circuits that have not addressed whether attorney fees should be included in a FRAP 7 bond. Selection of districts could also take into account the number of appeals and the prevalence of class action filings in the district to name a few relevant considerations. For this limited sample, the Center would then attempt to obtain all of the needed documents not available through PACER from the districts. This would allow for a more in-depth comprehensive study of the FRAP 7 activity in these chosen districts in order to best address the Committee's primary question of whether and when attorney fees are included in bonds and what are the rationales for including such fees.

Keeping in mind the Center's resource limitations and the Committee's time constraints, it may also make sense to decrease the study period to FRAP 7 activity in cases filed between fiscal years 2001 and 2006. Recent cases are more likely to produce data on contemporary conditions and practices and are also more likely to have electronic document links available under CM/ECF. One obvious drawback to proceeding in this manner is the time that it will take for the sample districts to respond to the requests for documents.

This proposal assumes that the Committee's primary interest is to learn about whether attorney fees were included in bond requests and the reasons for including or not including attorney fees in FRAP 7 bonds and to compare the experiences of districts in circuits with different rules. On the other hand, the Committee's ultimate goal may be to gain comprehensive national data on procedural issues associated with FRAP 7 bonds, such as:

- the frequency with which FRAP 7 motions have been made and granted in the district courts,
- the types of cases where FRAP 7 activity arise,
- the types of parties making motions for and subject to FRAP 7 bond, or
- the final outcomes of the appeals for which a FRAP 7 bond was granted or

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<sup>3</sup> Second Circuit, Sixth Circuit, Ninth Circuit, and Eleventh Circuit.

<sup>4</sup> D.C. Circuit and Third Circuit.

denied.

An alternative approach then would be to design a study that focuses on the requests and orders for a FRAP 7 bond and that describes the procedural progress of the appeal, rather than one that focuses on the rationale for and the components of the bond that was requested and ordered. Following this approach, we would include the majority of or all of the districts in the initial phase one search for cases with FRAP 7 activity. Once our database of cases is identified, we would limit the data collection in phase two (as was done in the exploratory study) to information found in docket entries and any documents available through PACER. The advantages of this approach are that it would be less resource intensive in that the information would all be derived from PACER and since the data collected is procedural in nature, the error rate due to inter-coder reliability would be relatively lower.

### **III. The Exploratory Study: The Research Data Collection Protocol<sup>5</sup>**

In addition to the question of the frequency of FRAP 7 activity, other issues raised at the Committee's discussion at the Fall 2007 meeting included:

- the types of cases FRAP 7 bonds are required in,
- types of litigants required to pay a FRAP 7 bond,
- the frequency with which a court imposes a FRAP 7 bond,
- the total amount of the bond and what components comprise this total, and
- whether attorney fees were included in the bond amount.

After identifying cases in the three exploratory study districts that appeared to have FRAP 7 bond activity, we then collected as much relevant data as were electronically available on each case for further analysis using the protocol described below. A FileMaker® database was created from this protocol to allow the coder to record the information in a database for further analysis.

Part One of the protocol collects identifying information for each case such as caption, district, docket number, nature of suit, filing and closing dates, case origin, jurisdiction, disposition of the case and procedural progress at disposition.

Part Two of the protocol relies upon information derived from docket entries as well as available relevant documents such as motions, responses and rulings. Given the time constraints, the data inputted for the exploratory study from the cases identified in NYS, CAC and MIE came exclusively from docket entries and relevant documents immediately available through PACER. We found that the information needed to answer the questions of most interest to the Committee is usually found in the full motions and rulings and cannot be adequately derived from docket entries alone. Thus, the exploratory study was limited in its access to key documents for most of the cases analyzed.

Part Two of the protocol focused on the motion for a FRAP 7 bond<sup>6</sup>. Information was gathered on the identity of the party (ies) who filed the motion and whether the party

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<sup>5</sup> See Appendix II: Draft Protocol for Further FJC Study of FRAP 7 Appellate Cost Bonds [on file with the author].

sought IFP status in either the district or appellate court. We captured information about the party opposing the motion. We also coded whether the case was filed as a class action, if so whether it was certified, and the type of judgment that was appealed. Where available, we also coded reasons for bringing the FRAP 7 bond motion. The response categories include those factors most courts list when deciding whether or not to impose a FRAP 7 bond. The final series of questions pertaining to the motion relate to the requested bond amount and whether the motion indicated if the amount requested included or should include: (1) costs attributable to a possible stay of the judgment being appealed (such as costs, attorney fees, and sanctions included in or interest on the underlying judgment)<sup>7</sup>; and/or (2) anticipated costs attributable to the appeal itself (such as specific costs, attorney fees, and sanctions incurred as a result of the appeal or additional costs from delay/disruption of settlement fund administration). If the information was available, we coded, the amount attributable to and authority cited for each separate component of the total requested bond amount.

Section C pertains to the ruling on the motion and includes questions on the bond amount. A final question asks whether the court stated its reasons for its ruling—either denying the request, granting the request for the amount stated in the motion, or granting the motion but increasing or decreasing the amount of the bond required.

If the ruling on the FRAP 7 bond motion was appealed by either party, our data protocol contained the same series of questions on the court of appeals ruling as pertained to the district court's ruling on the original motion. Finally, we coded information regarding:

- whether or not the bond was ever filed (if ordered), what the final outcome of the appeal was for which the FRAP 7 cost bond was requested,
- how costs were treated at the end of the appeal, and
- whether any sanctions were imposed against either party to the FRAP 7 cost bond before, during or after the appellate proceedings.

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<sup>6</sup> If more than one motion or sua sponte order for a FRAP 7 cost bond is filed with respect to a given appeal, only the information from the last motion or order filed and ruled on is used to answer the questions in Part Two of the protocol. However, if FRAP 7 bonds were either required or requested with respect to more than one appeal in the same case, a separate record will be created for each appeal.

<sup>7</sup> Technically, this first set of costs attributable to a possible stay of judgment should not be included in FRAP 7 cost bonds, though they might be eligible for inclusion in a bond required under Federal Rule of Civil Procedure 62 and/or FRAP 8. But in her extremely helpful and thorough review of the protocol in its draft stages, Professor Struve pointed out that it makes sense to code for both sets of costs since some courts erroneously include some items in FRAP 7 bonds that they technically shouldn't include (because they are not costs "on appeal"). Further, she noted that if a party moves for a stay of the underlying judgment pending appeal, and a court requires both a supersedeas bond in connection with the stay under FRCP 62 and/or FRAP 8 and a FRAP 7 bond for costs on appeal, the court might include the amounts attributable to both of these in one single bond.

#### IV. Exploratory Study: Summary of Findings

Given the small number of FRAP 7 cases identified in the exploratory study<sup>8</sup>, the following findings are limited to a description of the sampled cases only. These findings cannot be generalized to the population of FRAP 7 cases, even in the three study districts. In other words, the following discussion is intended only to illustrate the kind of data and questions that an expanded research proposal might address.

The most consistent finding is that motions and sua sponte show cause orders to impose FRAP 7 bonds were rare in the three districts, both in absolute numbers (43) and in percentage of appeals that involved FRAP 7 motions. The percentage of appeals that involved such requests or orders ranged from 0.05 percent to 0.15 percent. In other words, FRAP 7 activity occurred at a rate of between 5 and 15 times per 10,000 appeals in the three districts over the ten-year period from 1996 to 2006.

Again, bearing in mind the limitations of our exploratory study, the small number of appeals (N=43) with definite FRAP 7 activity and the lack of available documents, other findings were:

- FRAP 7 bonds were more likely to be imposed in response to requests in class action litigation (80% of requests (N= 8)) than in all appeals (51% (N=17)).
- Securities, intellectual property, civil rights, and contracts cases were the largest categories of cases with FRAP 7 motions or sua sponte orders; securities and antitrust cases accounted for eight of the ten class actions examined.
- Defendants were slightly more likely than plaintiffs to be the party moving for a FRAP 7 bond in non-class action appeals; in class action appeals, FRAP 7 activity most often took the form of a motion by plaintiffs or a joint motion.
- Represented individual litigants and corporate entities comprised most of the FRAP 7 movants. Individual litigants were slightly more likely to have their requests granted. Class representatives had by far the highest success rate, with 86% of their motions granted.
- Targets of motions in class actions were most often interveners or objectors (80% (N=8)). In non-class litigation, plaintiffs were more than twice as likely as defendants to be the targets of FRAP 7 motions. Three appellants subject to FRAP 7 motions filed for IFP status in both the district and appellate courts; two motions were granted and one was denied in both courts.
- Three motions targeted prisoners proceeding pro se and two of those motions were granted—again as with IFP motions, the numbers are too small to support any generalizable conclusion.
- The average bond amount sought was \$65,869 for all cases for which information was available (56% (N= 24)) and the average sought for seven certified class action appeals was \$113,378. Components of those requests were most often attorney fees and other costs incurred or anticipated as a result of the appeal.
- For the twelve cases in which information was available, courts granted the full request in three cases; reduced the request in seven cases; and doubled the request

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<sup>8</sup> For a detailed description of the process used to identify the sample of cases in the exploratory study, see Appendix I Exploratory Study Methods.

in two cases. All but one of those bonds was based on anticipated costs and attorney fees during the appeal. In two class action appeals, substantial portions of bonds of hundreds of thousands of dollars were attributable to anticipated delays and increased costs in administering a class settlement.

- Judges cited fee-shifting statutes as the authority for five of seven cases for which information was available. Judges cited sanctioning power as the authority in two cases.
- FRAP 7 bonds were challenged on appeal in six instances. None of the appeals was successful in overturning the imposition of the bond itself.
- Evidence regarding posting of bonds was only available in about half of the cases. In cases with available information the bond was usually posted in full, but in a few instances, a partial bond was posted without explanation.
- Only one of the underlying appeals resulted in vacating an order and remanding the case to the district court. All other appeals concluded with affirmances of the district court, dismissal on procedural grounds, or voluntary dismissal. Cases in which a bond had been imposed fared no better or worse than cases in which no bond was imposed. In one class action appeal, an objector voluntarily dismissed the appeal after being ordered to pay a \$1,240,500 bond.



## A. FRAP 7 Motions Brought and Granted

FRAP 7 bonds were more likely to be imposed in response to requests in class action litigation than in all appeals. Table 1 below presents a breakdown of the number of FRAP 7 motions brought and granted in all three districts in the exploratory study and by individual district. The data appear to show that in 25 appeals from all three districts (58%), the court granted a party's motion or sua sponte ordered a FRAP 7 cost bond: 55% of the appeals from NYS, 46% from MI-E and 80% of the appeals from CAC. In the ten certified class actions in the exploratory study, FRAP 7 motions or show cause orders were granted in 80% of the appeals as opposed to 51% of the non-class action appeals.

**Table 1. FRAP 7 Motions and Show Cause Orders, by District and Class Certification Status**

	Motions/Show Cause Orders	Sua Sponte Granted	Motion Granted	Percentage <sup>1</sup>
<b>All</b>	43 <sup>2</sup>	4	21	58
NY-S	20	4	7	55
MI-E	13	0	6	46
CA-C	10	0	8	80
<b>Class Actions<sup>3</sup></b>	10	1	7	80
NY-S	5	1	3	80
MI-E	2	0	1	50
CA-C	3	0	3	100
<b>Non-Class Actions</b>	33	3	14	51
NY-S	15	3	4	47
MI-E	11	0	5	45
CA-C	7	0	5	71

<sup>1</sup> Percentage of appeals in the category in which a FRAP 7 motion was granted or in which the court ordered a FRAP 7 bond sua sponte.

<sup>2</sup> There were 41 unique cases with FRAP 7 motions associated with one appeal per case. One case in CAC involved FRAP 7 motions associated with two unique appeals, thus this case is counted twice since the studies' unit for analysis is the appeal and not the case.

<sup>3</sup> There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

## B. Types of Cases with FRAP 7 Activity

Securities, intellectual property, civil rights, and contracts cases were the largest categories of cases with FRAP 7 motions or sua sponte orders; securities and antitrust cases accounted for eight of the ten class actions examined. As shown in Table 2 below, securities and intellectual property cases comprise the largest nature of suit groupings of cases identified as having FRAP 7 activity in our three pilot districts (a combined 38% of all appeals). Civil rights and contract cases are the next large categories (28% combined). This pattern is also present in the individual district breakdowns, except for MIE where torts and "other" cases share in the largest nature of suit categories with civil rights cases. For the ten certified class actions among the 43 cases identified as having FRAP 7 activity, six (60%) of them were securities cases followed by two antitrust cases and one

each civil rights and torts case. Focusing on the 25 appeals in which a FRAP 7 bond was ordered, the largest single nature of suit grouping is securities cases (24%) followed by civil rights and contracts cases (16% each) and intellectual property cases (12%).

**Table 2. Nature of Suit by District of Cases with FRAP 7 Activity**

	NY-S	MI-E	CA-C	Percentage <sup>1</sup>
<b>All appeals</b>	<b>20</b>	<b>13</b>	<b>10</b>	<b>100</b>
Antitrust	1	1		5
Bankruptcy Appeal	1			2
Civil Rights	3	2	1	14
Contracts	3	1	2	14
ERISA		1		2
Fraud		1		2
Intellectual Property	6		2	19
Prisoner Civil Rights		1	1	5
Prison Conditions	1			2
RICO		1	1	5
Securities	4	1	3	19
Torts	1	2		7
Other		2		5
<b>Class Actions<sup>3</sup></b>	<b>5</b>	<b>2</b>	<b>3</b>	<b>100</b>
Antitrust	1	1	0	20
Civil Rights	1	0	0	10
Securities	3	0	3	60
Torts	0	1	0	10
<b>FRAP 7 Bonds Ordered</b>	<b>11</b>	<b>6</b>	<b>8</b>	<b>100</b>
Antitrust	1	1	0	8
Civil Rights	1	2	1	16
Contracts	3	0	1	16
Intellectual Property	2	0	1	12
Prisoner Civil Rights	0	1	1	8
RICO	0	1	1	8
Securities	3	0	3	24
Torts	1	0	0	4
Other	0	1	0	4

<sup>1</sup> Percentage of appeals in the nature of suit category from all appeals with FRAP 7 activity, from only certified class actions with FRAP 7 activity, and from only cases where a FRAP 7 bond was ordered.

<sup>2</sup> There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

### C. Parties Moving for FRAP 7 Bond (Identity of Appellee)

Defendants were slightly more likely than plaintiffs to be the party moving for a FRAP 7 bond in non-class action appeals; in class action appeals, FRAP 7 activity most often took the form of a motion by plaintiffs or a joint motion. Our preliminary data from the 43 appeals with FRAP 7 activity identified from NYS, MIE and CAC shows that the defendant was the party moving for the FRAP 7 bond in 58% of these appeals, 63 percent if one includes joint motions. Further, the defendant was the moving party in 67% of non-

class actions. For class actions, the plaintiff brought the FRAP 7 motion in half of the appeals and the defendant was the moving party in 20% of them; 40% if joint motions are included.

Excluding two joint motions which were granted, the bond was granted in 56% of the appeals in which the defendant was the movant (fourteen out of twenty-five appeals). When the plaintiff was the moving party, the FRAP 7 bond motion was granted in 45% of the appeals (five out of eleven appeals). In class actions, the bond was granted in half of the appeals in which the defendant was the moving party (one out of two appeals) while 80% of the appeals were granted in which the plaintiff was the movant (four out of five appeals). For FRAP 7 bonds ordered in non-class actions, the bond was granted in 59% of the appeals for which the defendant was the movant (thirteen out of twenty-two appeals), and the plaintiff was the movant in 17% of these appeals resulting in a FRAP 7 bond being ordered (one out of six appeals).

**Table 3. Parties Moving for FRAP 7 Bond, by District and Class Certification**

	NY-S	MI-E	CA-C	All
<b>Total</b>	20	13	10	43 <sup>1</sup>
Sua Sponte/Show Cause Order	4	0	0	4
Plaintiff	5	4	2	11
Defendant	11	9	5	25
Joint Motion	0	0	2	2
Intervener/Objector	0	0	0	0
Other	0	0	1	1
<b>Class Actions Total<sup>2</sup></b>	5	2	3	10
Sua Sponte/Show Cause Order	1	0	0	1
Plaintiff(s)	2	2	1	5
Defendant(s)	2	0	0	2
Joint Motion	0	0	2	2
Intervener/Objector	0	0	0	0
Other	0	0	0	0
<b>Non-Class Actions Total</b>	15	11	7	33
Sua Sponte/Show Cause Order	3	0	0	3
Plaintiff(s)	3	2	1	6
Defendant(s)	9	9	5	22
Joint Motion	0	0	0	0
Intervener/Objector	0	0	0	0
Other	0	0	1	1

<sup>1</sup> There were 41 unique cases with FRAP 7 motions associated with one appeal per case. One case in CAC involved FRAP 7 motions associated with two unique appeals, thus this case is counted twice since the studies' unit for analysis is the appeal and not the case.

<sup>2</sup> There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

What types of plaintiffs, defendants, or other parties brought the FRAP 7 bond motions? Represented individual litigants and corporate entities comprised most of the FRAP 7 movants. Individual litigants were slightly more likely to have their requests granted. Class representative had by far the highest success rate, with 86% of their motions granted. Taking into account that more than one party may join a FRAP 7 motion, data for the three pilot districts show that corporate entities (40%) and represented individuals (32%) were the largest groupings by party type moving for a FRAP 7 bond. In the motions where at least one party was a represented individual(s), 52.9% of these motions were granted; 86% of the motions brought by class representatives (all in class action appeals) were granted; 43% of the appeals where the moving party included a corporate entity were granted; and 80% of the motions involving a government party were granted.

#### D. Parties Subject to FRAP 7 Motion (Identity of Appellant)

Targets of motions in class actions were most often interveners or objectors (80%). In non-class litigation, plaintiffs were more than twice as likely as defendants to be the targets of FRAP 7 motions. The party or parties subject to a FRAP 7 motion in 53% of the 43 unique appeals identified in the pilot districts was the plaintiff(s) followed by the defendant(s) in 26% of the appeals. In the ten certified class actions in the study, it was the intervener or objector as the appellant subject to the bond in 80% of these appeals. Keeping in mind the caveats stated earlier about not extrapolating the findings from these three pilot districts to the broader universe of FRAP 7 motions, our data for the three districts show that in class actions, six of the eight motions brought “against” an intervener/objector party(ies) were granted, for a 75% grant rate. In non-class actions, 12 of the motions “against” plaintiffs were granted, for a 52% grant rate. Two motions “against” defendants were granted, for a 20% grant rate.

**Table 4. Parties Subject to FRAP 7 Motion, by District and Class Certification**

	NY-S	MI-E	CA-C	All
<b>All appeals</b>	20	13	10	43 <sup>1</sup>
Plaintiff(s)	10	8	5	23
Defendant(s)	6	3	2	11
Intervener/Objector(s)	4	2	2	8
Other	0	0	1	1
<b>Class Actions Total<sup>2</sup></b>	5	2	3	10
Plaintiff(s)	0	0	0	0
Defendant(s)	1	0	0	1
Intervener/Objector(s)	4	2	2	8
Other	0	0	1	1
<b>Non-Class Actions Total</b>	15	11	7	33
Plaintiff(s)	10	8	5	23
Defendant(s)	5	3	2	10
Intervener/Objector	0	0	0	0
Other	0	0	1	0

<sup>1</sup> There were 41 unique cases with FRAP 7 motions associated with one appeal per case. One case in CAC involved FRAP 7 motions associated with two unique appeals, thus this case is counted twice since the studies' unit for analysis is the appeal and not the case.

<sup>2</sup> There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

Looking at the types of parties asked to post a FRAP 7 bond from our small universe of districts and keeping in mind that more than one type of party can bring an appeal in a case, it appears that represented individuals (42%), corporate entities (12%) and pro se individuals (19%) were the most likely subject to the bond motion. When the appellant was a represented individual, the bond motion was granted in 45.5% of the appeals; 50% of the appeals in which a pro se individual was the appellant were granted; and 68% of the appeals (two out of three appeals) involving a pro se prisoner subject to the bond were granted. Three appellants subject to the FRAP 7 motion filed for IFP status in both the district and appellate courts. Two of these motions for IFP status filed in the district and appellate court were granted in both courts; one was denied in both courts. Again, we caution against reaching any conclusions from this small number of cases. The fact that two of three FRAP 7 motions “against” pro se prisoners were granted cannot be taken as evidence that this is how often such motions “against” prisoners are typically granted. Three cases is only anecdotal evidence.

#### **E. Amounts Requested in Motions for FRAP 7 Bond**

As depicted in Table 5 below, the mean overall bond amount was \$65,869 for all cases for which information was available (56% (N=24)), while the overall mean for the seven certified class actions requesting a specific bond amount was \$113,378. Components of those requests were most often attorney fees and other costs incurred or anticipated as a result of the appeal.

From the 43 appeals we identified in the three pilot districts as having at least one motion for a FRAP 7 bond, 24 of these appeals (56%) requested that the court require the appellant to post a bond in a specific named amount. Remember that only documents accessible through PACER were relied upon, thus it must be noted that in ten of these 24 cases the information on the bond amount request was obtained solely from the docket not the motion itself.

**Table 5. Requested Bond Amounts in FRAP 7 Motions**

	<b>Number of appeals requesting specific bond amount</b>	<b>Mean Bond Amount Requested</b>
<b>(Overall) Appeals</b>	24	\$65,869
NYS	11	\$56,627
MIE	8	\$73,343
CAC	5	\$74,240
<b>(Overall) Class Actions</b>	7	\$113,378
NYS	3	\$42,636
MIE	2	\$223,871
CAC	2	\$109,000

## F. Components of Bond in FRAP 7 Motion

The protocol asks whether the appellee’s FRAP 7 bond motion indicates whether the amount requested included or should include a number of listed components. Responses to this inquiry are very limited because “unable to determine because motion not available” was checked for this question in 67.4% of the 43 FRAP 7 appeals identified in the pilot districts. In those appeals where information about what the movant included in the requested bond amount, or proposed should be included in a bond amount, was discernable from docket information or available motions, costs attributable to a possible stay of the judgment being appealed was a component of the requested bond in only three occurrences. Two of these bond motions included attorney fees awarded in the underlying judgment, and one requested bond amount included sanctions awarded in the underlying judgment.

Bond motions including anticipated costs attributable to the appeal itself were more numerous in comparison. The two components of this category that movants included most often in their bond motions were specific costs incurred or anticipated will be incurred as a result of the appeal itself such as printing or copying costs for trial transcripts (9 or 21% of total appeals) and attorney fees incurred or anticipated as a result of the appeal (11 or 26% of total appeals). When broken out by district and limited to the one-third of all cases for which information was available, 20% of the NYS bond requests included anticipated attorney fees in the bond amount, as did 31% of MIE appeals and 30% of CAC appeals.

**Table 6. Components of Requested Bond in FRAP 7 Motions**

	NYS (20)	MIE(13)	CAC(10)
<b>Costs attributable to possible stay of judgment being appealed:</b>			
(1) specific costs included in underlying judgment	0	0	0
(2) attorney fees included in underlying judgment	1	1	0
(3) sanctions included in underlying judgment	0	1	0
(4) interest on underlying judgment	0	0	0
(5) other	0	0	0
<b>Anticipated costs attributable to appeal itself:</b>			
(1) Specific costs incurred due to appeal	1	6	2
(2) attorney fees incurred as result of appeal	4	4	3
(3) sanctions incurred as result of appeal	1	2	0
(4) additional costs from delay/disruption	1	2	0
(5) other	0	2	2

## G. Amount of FRAP 7 Bonds Granted

What was the correlation between the bond amount requested in the appellee's motion and the amount the court ordered the appellant to pay? For the twelve cases in which information was available, courts granted the full request in three cases; reduced the request in seven cases; and doubled the request in two cases. All but one of those bonds was based on anticipated costs and attorney fees during the appeal. In two class action appeals, substantial portions of bonds of hundreds of thousands of dollars were attributable to anticipated delays and increased costs in administering a class settlement.

Although the court granted a bond request in 25 out of 43 of the appeals identified in the three pilot districts, we only have information on bond amounts granted and ordered for twelve appeals. In NYS, two bond motions were granted at the requested amount, and three were reduced (from \$75,000 to \$25,000; from \$75,000 to \$50,000; and from \$30,000 to \$25,000)<sup>9</sup>. In MIE, one bond was granted in the requested amount, and two were reduced (one substantially from \$427,743 to \$174,429)<sup>10</sup>. In CAC, two bond requests were reduced (from \$50,000 to \$6,000<sup>11</sup> and from \$100,000 to \$5,000<sup>12</sup>), and two were doubled (from \$104,000 to \$208,000, and from 114,000 to \$228,000)<sup>13</sup>.

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<sup>9</sup> Because the rulings were not available for these appeals, we were unable to research the reasons for the reductions.

<sup>10</sup> Although the amount of the appeal bond granted by the court included specified costs (\$1,000), anticipated attorneys fees (\$50,000) and administrative costs for delay (\$123,000), the court reduced the requested bond amount in light of the plaintiffs motion for an expedited appeal that the objector/appellant assured the court she would not oppose which decreased the anticipated delay from 16-months to a projected 6-months. *See Sams v. Hoechst*, No. 99-73190 (E.D. Mich. June 25, 1999) (Corrected Order No.82 Granting Plaintiffs' Motion for Imposition of an Appeal Bond Under FRAP 7) (part of *In re: Cardizem CD Antitrust Litig.*, No. 99-1278 (E.D. Mich. June 25, 1999). On appeal, the Sixth Circuit upheld the \$174,000 appeal bond that included anticipated attorneys' fees and administrative costs for delay. *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6<sup>th</sup> Cir. 2004).

<sup>11</sup> Even though court alluded to frivolousness of the appeal in granting the bond request, court refused to order plaintiff to post a \$50,000 appeal bond as requested because it would not serve the interests of justice since the court denied the plaintiff's motion to proceed ifp on appeal. *Lewis v. Bayh*, No. 04-2950 (C. D. Cal. Feb. 26, 2007) (Order Granting Defendant's Motion to Require Appellant to File a Bond to Ensure Payment of Costs on Appeal).

<sup>12</sup> The party who brought FRAP 7 motion requested a \$100,000 bond amount including: (1) \$20,000 in anticipated attorney fees; (2) \$1,697.20 for transcripts for the appeal already incurred; (3) \$500 for anticipated costs for an additional transcript; (4) \$10,000 for anticipated costs of the appeal. The court ruled that the bond amount could not include attorneys' fees because they are not defined as costs under the Lanham Act thus these anticipated fees can't be included in a FRAP 7 bond. The court further found that defendants did not prove how they came up with the requested bond amount. *BRWC LLC v. Van De Water*, No. 04-466 (C.D. Cal. July 28, 2006) (Order Granting Defendant's Motion to Require Appellant to Post Bond for Costs and Attorney's Fees on Appeal).

<sup>13</sup> In both appeals the court doubled the requested bond amount as sanctions against the objector and the co-counsel law firm for filing meritless and frivolous appeals. *In re Heritage Bond Litig.*, 2005 WL 2401111 (C.D. Cal. Sept. 12, 2005). The inclusion of attorney's fees in the FRAP 7 bond amount was overturned on appeal since the court found the underlying statutes (provisions of PSLRA) were not fee-shifting statutes that defined costs as including attorney's fees. 233 Fed.Appx. 627, 2007 WL 1340633 (9<sup>th</sup> Cir. May 8, 2007).

## H. Components of Granted FRAP 7 Bond Amounts

We had access to the ruling in only eleven of the 43 appeals in which the court ordered a bond so our ability to present an accurate summary of what courts included in the final bond amount is very limited. Only one appeal from NYS included costs attributable to the underlying judgment in the final bond amount<sup>14</sup>. Anticipated costs on appeal (seven appeals) and attorney fees anticipated on appeal (all eleven appeals) were the two components included most often in the bond amount ordered. When specified in the ruling, authority for including specific costs in the bond amount was FRAP 39 in all three districts. Anticipated named costs on appeal included printing and copying costs, filing and brief preparation costs, and costs for the trial transcript.

**Table 7. Components of FRAP 7 Bonds Ordered by Court**

	NYS (20)	MIE(13)	CAC(10)
<b>Costs attributable to possible stay of judgment being appealed:</b>			
(1) specific costs included in underlying judgment	1	0	0
(2) attorney fees included in underlying judgment	0	0	0
(3) sanctions included in underlying judgment	0	0	0
(4) interest on underlying judgment	0	0	0
(5) other	0	0	0
<b>Anticipated costs attributable to appeal itself:</b>			
(1) Specific costs incurred due to appeal	2	2	3
(2) attorney fees incurred as result of appeal	3	3	5
(3) sanctions incurred as result of appeal	0	0	3
(4) additional costs from delay/disruption	0	1	1
(5) other	1	1	0

Judges cited fee-shifting statutes as the authority for five of seven cases for which information was available. Judges cited sanctioning power as the authority in two cases. In NYS, the authority cited in the only ruling available among the three appeals which included attorney fees in the bond amount was Title VII as the fee-shifting statute authorizing attorney fees as part of recoverable costs under the rationale of *Adsani v.*

<sup>14</sup> The court ordered the plaintiff to post a \$7,500 bond to cover the judgment for the costs already incurred (\$4,057) and anticipated costs of opposing the appeal. *Green v. Doukas*, No. 97-8288 (S.D. N.Y. Nov. 7, 1997) (information obtained from docket). The Second circuit refused to vacate the district court's order holding that the district court did not act improperly in including these costs in the amount of the bond to be posted pursuant to FRAP 7. *Green v. Doukas*, No. 02-7136 (2d Cir. July 1, 2003) (information from docket).



*Miller*<sup>15</sup>. In MIE, one case relied on the fee-shifting statute rationale explained in *Adsani* and *Pedraza*; however, one case included attorney fees under the court's inherent power to sanction a party for acting in bad faith. The court stated that it is within the court's discretion to include attorney fees in a cost bond when district court judge has determined the appeal to be frivolous.<sup>16</sup> In CAC, the fee-shifting statute rationale was the authority cited in three of the available rulings including attorneys' fees in the FRAP 7 bond. However, one case included attorney fees resulting from the appeal to cover a potential FRAP 38 award following a potential finding of frivolousness under 28 USC 1927.<sup>17</sup> After a settlement was reached in this securities fraud class action, class plaintiffs moved to require the objectors to post an appeal bond after objectors appealed the court's judgment. The court ordered a bond of \$1,240,500, which was never posted; the appeal was voluntarily dismissed by the appellant. Note that the Ninth Circuit has since held in *Azizian v. Federated Dep't Stores, Inc.*<sup>18</sup> that a district court cannot include appellate attorneys' fees that might be awarded if the court of appeals holds that the appeal was frivolous under FRAP 38.<sup>19</sup> Thus, the three CAC appeals where the court included amounts for sanctions the court anticipated would be awarded against the appellant on appeal under FRAP 38 and 28 USC 1927 would no longer be permitted<sup>20</sup>.

Two accessible rulings granting FRAP 7 bonds included anticipated additional costs from delay or disruption of the settlement fund administration in the bond amount. A MIE appeal bond of \$174,429 included \$123,429 for increased administrative costs incurred in the disbursement of the settlement funds due to the delay caused by objector's appeal.<sup>21</sup> The CAC district court decided that costs of delay and disruption of the settlement administration process (determined to be \$517, 700) should be included in the FRAP 7 bond amount under a broad interpretation of FRAP 7 in the class settlement

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<sup>15</sup> 139 F.3d 67 (2d Cir. 1998). *Watson v. E.S. Sutton, Inc.*, No. 02-2739 (S.D. N.Y. Dec. 6, 2006) (Interim Order).

<sup>16</sup> *Horacek v. Hawkey*, No. 01-71674 (E.D. Mich. Aug. 18, 2003) (Order Granting Defendant's Motion For Bond For Costs on Appeal).

<sup>17</sup> *Kurtz v. Broadcom*, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond). The court decided the amount of bond should include attorney's fees to defend the appeal under FRAP 38 (to cover a potential FRAP 38 award) and under a potential finding of frivolousness under 28 USC Sec. 1927 and an amount to secure potential double costs for frivolous appeal under FRAP 38.

<sup>18</sup> 2007 WL 2389841 (9<sup>th</sup> Cir. Aug. 23, 2007).

<sup>19</sup> *Id.*, at \*1.

<sup>20</sup> *In re Heritage Bond Litig.*, 2005 WL 2401111 (C.D. Cal. Sept. 12, 2005) (The district court granted the lead plaintiffs motion (in a securities class action that had settled) to impose a FRAP 7 bond on : (1) co-counsel law firms that had appealed the award of attorneys' fees to ensure payment of the anticipated award of fees and costs on appeal and as a sanction of filing an unfounded and meritless appeal; court awarded two times requested amount of \$104,000=\$208,000; (2) an objector to the global settlement in the class action to provide some level of security to lead plaintiffs in light of frivolousness of objector's appeal; court awarded two times requested amount of \$114,000=\$228,000.); *Kurtz v. Broadcom*, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond) (Court decided amount of bond should include, in addition to other components, an amount (\$620,250) to secure potential double costs for a frivolous appeal under FRAP 38.)

<sup>21</sup> See *Sams v. Hoechst*, No. 99-73190 (E.D. Mich. June 25, 1999) (Corrected Order No.82 Granting Plaintiffs' Motion for Imposition of an Appeal Bond Under FRAP 7) (part of *In re: Cardizem CD Antitrust Litig.*, No. 99-1278 (E.D. Mich. June 25, 1999). On appeal, the Sixth Circuit upheld the \$174,000 appeal bond that included anticipated attorneys' fees and administrative costs for delay. Court found that the FRAP 7 bond serves purpose of a supersedeas bond since objector's appeal stays judgment. *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6<sup>th</sup> Cir. 2004).

context. Adopting the rationale of *In re Cardizem*, the court found that the FRAP 7 bond serves the purpose of a supersedeas bond since the objector's appeal effectively postpones distribution of the entire judgment over a year.<sup>22</sup>

### **I. Appeal of the Bond Order**

FRAP 7 bonds were challenged on appeal in six instances. None of the appeals was successful in overturning the imposition of the bond, although the amount was successfully challenged in one case. The courts' order for appellants to post a FRAP 7 bond before proceeding with their underlying appeal was itself appealed in six of the 25 underlying appeals where such a ruling was made. A pro se plaintiff was the appellant in three of these six appeals. In five of the six appeals, the district court's decision to impose the bond was upheld; in one case the appeal of the bond and the underlying appeal were dismissed on other procedural grounds and the bond was not paid. In three of the five cases where the bond was upheld on appeal, the appellate court upheld the amount of the bond as ordered by the district court. In one case, the Federal Circuit upheld the bond in the amount of \$500, reduced significantly from the \$25,000 plaintiff was ordered to pay in the district court. However, this reduction did not occur as a result of an appeal of the bond by the appellant but as a result of a motion to dismiss by appellees' for plaintiff's failure to pay the bond as ordered. The appellant paid the \$500 bond and the underlying appeal proceeded. The reasoning behind the reduction of the bond was not discernible because the appellate court order was not available.<sup>23</sup>

The appellate court's reasoning for upholding the bond on appeal was available in only two of the appeals, both of which focused on analysis of whether the underlying statute allowed fee-shifting. In a MIE class action, the Sixth Circuit upheld the district court's decision ordering an objector to pay a \$174,429 bond, including anticipated attorneys' fees.<sup>24</sup> When the appellant failed to pay the bond, the appeal was dismissed. After an objector in a class action appealed the order by the CAC district court to pay a \$228,000 FRAP 7 bond, the Ninth Circuit upheld the imposition of the bond but vacated and remanded for recalculation of the FRAP 7 bond without inclusion of attorneys' fees holding that FRAP 7 does allow a district court to impose a bond that includes attorneys' fees as "costs" if there is an applicable fee-shifting statute in the underlying action that specifically defines costs to include attorney fees. However, the court found that provisions of the PSLRA that contemplated award of attorney fees to a successful plaintiffs' attorney were not fee-shifting statutes that defined costs as including attorney fees.<sup>25</sup> The underlying appeal is still pending.

### **J. Posting of FRAP 7 Bond**

Evidence regarding posting of bonds was only available in about half of the cases. In cases with available information the bond was usually posted in full, but in a few instance, a partial bond was posted without explanation. Our data shows that in ten

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<sup>22</sup> Kurtz v. Broadcom, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond).

<sup>23</sup> Abraskin v. Caldor-Store 75, No. 98-3835 (S.D. N.Y. May 29, 1998), *affirmed on appeal sub nom.* Abraskin v. Entrecap Corp., No. 99-1510 (Fed. Ct. App. Aug. 1, 2000).

<sup>24</sup> *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6<sup>th</sup> Cir. 2004).

<sup>25</sup> *In re Heritage Bond Litig.*, 233 Fed.Appx. 627, 2007 WL 1340633 (9th Cir. May 8, 2007).

appeals out of the 12 appeals where information was available and where the court ordered a bond to be paid, the appellant posted the bond in full. In two appeals, the bond was paid in less than the full amount ordered<sup>26</sup>. No evidence regarding payment was found in the docket or other available documents in the other thirteen cases where a FRAP 7 bond was ordered. See Table 8 below for a district breakdown of the payment of ordered bonds. For the eight appeals identified as certified class actions in which the court ordered a FRAP 7 bond, the appellant posted the bond in full as ordered in three appeals; and paid an amount less than the amount ordered in two appeals. No evidence of payment was available for the remaining three class actions ordered to post an appellate bond.

**Table 8. Posting of FRAP 7 Bond**

	NYS	MIE	CAC
<b>Overall FRAP 7 Bonds Ordered:</b>	11	6	8
Bond Posted in Full	6	2	2
Bond Posted in Less Than Full Amount	2	0	0
<b>FRAP 7 Bonds Ordered in Class Actions:</b>	4	1	3
Bond Posted in Full	2	1	0
Bond Posted in Less Than Full Amount	2	0	0

### K. Final Outcome of Appeal

Overall, 19 (44%) of the 43 appeals for which a FRAP 7 cost bond was requested proceeded to a decision on appeal—18 (42%) of these were affirmed by the appellate court and one was vacated and remanded to the district court. Overall, 18 (42%) of all appeals were dismissed. Four of these were dismissed because the appellant failed to pay the bond as ordered.<sup>27</sup> The other fourteen appeals (33%) were dismissed on other procedural grounds (4), on appellee’s motion (2) or voluntarily by the appellant (8). Of the eight cases voluntarily dismissed by the appellant, a FRAP 7 bond was ordered in three cases, the court denied the FRAP 7 motion in three cases, the FRAP 7 motion was withdrawn in one case and it is unclear from the docket or available records whether the

<sup>26</sup> In one NYS appeal, a \$70,000 bond was ordered; the defendant posted a \$50,000 bond (no reason given for reduced payment in record or available documents). In another NYS case, plaintiff and his attorney were ordered to pay a \$65,000 bond; the attorney paid his ordered portion of \$15,000 but the plaintiff did not post the remaining \$50,000 (no reason given for reduced payment in record or available documents).

<sup>27</sup> Second Circuit dismissed a NYS appeal (class action) after objector failed to pay the \$25,000 FRAP 7 bond as ordered. The Sixth Circuit dismissed a MIE appeal after plaintiff failed to pay a \$9,810 FRAP 7 bond. Another MIE appeal (class action) was dismissed after the objector failed to pay the \$174,429 FRAP 7 appeal bond as ordered. See *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6<sup>th</sup> Cir. 2004) (appellant made no effort in district court to justify her failure to post the bond and failed to demonstrate the bond amount would constitute a barrier to her appeal). After upholding a \$5,000 appeal bond imposed by MIE district court, Sixth Circuit dismissed the appeal for plaintiff’s failure to post the bond. *Id.*

motion was granted or denied, although the docket shows that appellants posted a FRAP 7 bond. The appeal is still pending final ruling in six cases (14%).

**Table 9. Final Outcome of FRAP 7 Appeals**

	NYS	MIE	CAC
<b>Overall appeals with FRAP 7 Activity</b>	20	13	10
Appeal dismissed for appellant's failure to pay bond	1	3	0
Appeal dismissed on other procedural grounds	3	0	1
Appeal dismissed on appellee's motion	2	0	0
Appeal voluntarily dismissed by appellant	6	1	1
Appeal proceeded to decision on merits (affirmed, reversed, vacated and remanded)	7	8	4
Appeal still pending	1	1	4
<b>FRAP 7 Bonds Ordered</b>	11	6	8
Appeal dismissed for appellant's failure to pay bond	1	3	0
Appeal dismissed on other procedural grounds	2	0	1
Appeal dismissed on appellee's motion	1	0	0
Appeal voluntarily dismissed by appellant	2	0	1
Appeal proceeded to decision on merits (affirmed, reversed, vacated and remanded)	4	3	2
Appeal still pending	1	0	4
<b>FRAP 7 Appeals Bond Paid in Full or Less Than Full Amount:</b>	8	2	2
Appeal dismissed for appellant's failure to pay bond	0	0	0
Appeal dismissed on other procedural grounds	0	0	1
Appeal dismissed on appellee's motion	0	0	0
Appeal voluntarily dismissed by appellant	2	0	0
Appeal proceeded to decision on merits (affirmed, reversed, vacated and remanded)	5 <sup>1</sup>	1	1
Appeal still pending	1	1	0

<sup>1</sup>In NYS, there are 5 appeals which proceeded to a decision on the merits after the appellant posted a bond even though the table shows only 4 appeals from the 11 NYS cases where the court ordered a bond paid; only 4 cases were ruled on because in 1 case the docket showed the appellant posted a FRAP 7 bond even though it didn't show whether the motion was granted or denied.

Only one of the underlying appeals produced an outcome that could be characterized as a victory for the appellant. Focusing on the 25 appeals for which the court ordered the appellant to post a FRAP 7 bond, (11) 44% of these appeals were dismissed, (9) 36% proceeded to a decision on the merits of the appeal, and (5) 20% are still pending. Of those appeals dismissed, four were dismissed due to the appellant's failure to pay the bond, three were dismissed on other procedural grounds, one on the appellee's motion, and three were voluntarily dismissed by the appellant. In two of the cases in which the appellant voluntarily dismissed the appeal, the appellant paid the bond in full prior to dismissing the appeal. The third appeal was a CAC class action in which the objector voluntarily dismissed the appeal after being ordered to pay a \$1,240,500 bond.<sup>28</sup> The data also shows that in the twelve cases from our study where the appellant posted the bond in full or in part, half of these appeals were decided on the merits, 34% were dismissed (one on other procedural grounds and two voluntarily by the appellant) and 16% are still pending.

## V. Conclusions and Possible Options for Committee Action

One of the purposes of this report is to focus the Committee's attention on the options available for further Center research on the FRAP 7 bond question, as well as to obtain the Committee's direction for such research. The results of the exploratory study lead us to recommend different approaches for further empirical research depending upon the type of additional FRAP 7 data the Committee deems most important for its further deliberations. Gathering data on FRAP 7 issues of a substantive nature (i.e., reasons for FRAP 7 bond motions and rulings, amount of bond requested and granted, components of and authority for the bond amount including attorney fees) requires access to motions papers and orders. To obtain this data from a sufficient sample of cases, we must narrow the study to a limited number of districts chosen based upon current FRAP 7 circuit law. The above study would include for those districts FRAP 7 procedural data such as type of case, type and identify of parties, ruling on the motion, payment of the bond, appeal of FRAP 7 bond orders, and final outcome of the underlying appeal can be derived from the docket report alone. If, however, the Committee wants to emphasize procedural data, the Center would be able to obtain such data from a majority or perhaps all of the districts. The Center cannot due to resource constraints, however, pursue an option that would entail collecting both procedural and substantive data from all cases in all districts. We ask the Committee to express its preference.

More specifically, the options for further Center research are:

- 1) Conduct in-depth research, like the exploratory study described above, in a larger sample of districts representing circuits with one of the three types of rules (attorney fees allowed; attorney fees not allowed; and no rulings on attorney fees in FRAP 7 bonds). Such a study would produce data of the type generated in the exploratory study, plus additional data on motions, opinions, and orders documenting the reasons for the rulings and would provide insight into the elements that are included in the bonds that were imposed. The Center

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<sup>28</sup> Kurtz v. Broadcom, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond).

- recommends pursuing this type of study to collect data on factors that the Committee has expressed interest in collecting and analyzing.
- 2) Conduct a study in more than a sample of districts, perhaps all districts, but limiting such a study to procedural information that can be obtained from the automated docket records. Thus, such a study would not include information about reasons for which the bonds were ordered, nor would the study generate findings about the specific elements included in the bonds that were imposed. The Center recommends that the Committee ask the Center to conduct such a study only if the Committee's interest is limited to procedural information.
  - 3) That the Center design a variation of the studies proposed in 1 and 2.

After discussing the nature of the data the Committee would find most helpful, the FJC would like the Committee's input on the general two-part structure of the proposed empirical study in general and on the structure and content of the protocol in specific. Are there any additional issues related to the imposition of a FRAP 7 cost bond not captured by the topics covered in the protocol? Does the line of questioning in the protocol sufficiently address the issues that are covered? Is the protocol over-inclusive in that it covers topics the Committee has no interest in at this time thus warranting a scaled down version to be used in further research? Of course, the answer to many of these inquiries will depend on the empirical approach followed.

## **Appendix I: Exploratory Study Methods**

In order to identify cases filed or removed in a district court between fiscal year 1996 and 2006 in which FRAP 7-related activities occurred required the use of a text-based search of the Case Management Electronic Case Filing [CM/ECF] replication databases maintained by the courts. This targeted CM/ECF search produced a list of cases in a particular district for the time period identified in which the following terms occurred in at least one docket entry: “FRAP 7” OR “F.R.A.P. 7” OR “Rule 7” OR “F.R.App. P. 7” OR “Fed. R. App. P. 7” OR (“Bond” AND “Cost”) OR (“Bond” AND “Appeal”) OR (“Bond” AND “Appell”) OR “Federal Rule of Appellate Procedure 7” (with a “hit” for any docket entry including any of the terms or pairs of terms). Next, PACER was used to pull up the full docket report of those cases identified to verify that the case indeed included a motion or order for a cost bond pursuant to Federal Rule of Appellate Procedure 7. This review/reading of docket records allowed for the elimination of false positives from the sample, i.e., a request for a bond pending appeal in a habeas case, a request for a supersedeas bond under FRCP 62, imposition of a bond in cases involving injunctive relief and seizure of property, etc.

This method of identifying all discussions of FRAP 7 bond requests, whether or not the court ultimately imposes a bond requirement enables us to identify all (or at least a very high percentage of all) FRAP 7 activity in the federal courts in the study period. To escape this search, a case with FRAP 7 activity would have to be a case in which the search terms listed above never appeared in a docket entry. Thus, using Pacer to further refine this list as described above, for each district searched we were left with a database of two types of cases: (1) cases with definite activity related to a motion or order for a FRAP 7 cost bond on appeal<sup>29</sup>; and (2) cases which involved activity related to a cost bond but because the relevant documents were not available through PACER it was not possible to determine whether or not the cost bond discussion involved FRAP 7. Only the first type of cases (i.e., those with definite FRAP 7 activity) were included in the final database of cases for a particular district<sup>30</sup>.

For the exploratory study, the text-based search described above was conducted in the CM/ECF replication databases for three districts—NYS, CAC, and MIE. For each of the three districts, the number of cases in the final database representing definitive FRAP 7 activity was surprisingly low.

In NYS, the original search of the CM/ECF replication database produced 485 potential “hits” (cases with at least one of the search terms in at least one docket entry). After eliminating false positives, only 20 cases with definitive FRAP 7 activity remain with three cases falling into the “uncertain” category because the documents needed to make a correct determination were not accessible on PACER. There were 15,161 cases<sup>31</sup>

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<sup>29</sup> A case with definitive FRAP 7 activity is defined for purposes of this study as one that includes at least one motion (by a party or sua sponte) for a cost bond on appeal brought pursuant to FRAP 7 and may include opposition to the motion, a ruling on the motion, appeal of that ruling, or other similar FRAP 7-related motions or orders.

<sup>30</sup> The last step in arriving at the final database for each district involves the elimination of member cases involved in inter-and intra- district consolidations, leaving only single cases or lead cases.

<sup>31</sup> These data are taken from the Federal Judicial Center’s Integrated DataBase for Federal Appeals.

appealed to the Second Circuit from NYS between fiscal year 1996 and 2006. Thus, in NYS, 0.13% of appeals involved cases with FRAP 7 activity.

The original CM/ECF search of the CAC replication database identified 875 potential “hits”. Eliminating false positives and two member cases, only nine definitive FRAP 7 cases remain in the final population for analysis. Three cases were listed as “uncertain”. Between fiscal year 1996 and 2006, 18,463 cases<sup>32</sup> were appealed to the Ninth Circuit from CAC. Thus, cases with FRAP 7 activity comprised 0.05% of appeals in CAC.

In MIE, the original search of the CM/ECF replication database produced 226 potential “hits” dwindled down to 13 cases positive for FRAP 7 activity after eliminating false positives and 16 member cases. Seven cases were categorized as “uncertain” because key documents were unlinked in PACER. There were 8,615 cases<sup>33</sup> appealed to the Sixth Circuit from MIE between fiscal year 1996 and 2006. Thus, in MIE 0.15% of appeals involved cases with FRAP 7 activity.

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*